IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-623

SHARON ROGERS,

Petitioner,

v.

FRANCIS LOUGH, Magistrate for
Wetzel County, West Virginia

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of
Appeals of West Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

Cases Cited

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Francis Lough, Magistrate of Wetzel County, West Virginia, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Supreme Court of Appeals of West Virginia's order in this case. That order is unreported.

QUESTIONS PRESENTED

1. Whether this Court should grant a writ of certiorari where there exists a nonfederal question relevant to the constitutional issue raised in the petition which has not been considered or resolved by a state's highest court?

2. Whether the record before this Court is adequate to present the facts necessary for a determination of the issues presented?

3. Whether the rule of *North* v. *Russell*, 427 U.S. 328, 49 L. Ed. 2d 534, 96 S. Ct. 2709 (1976), which holds that a criminal defendant is not deprived of liberty without due process of law or effective assistance of counsel by a first trier before a lay judge when the defendant can painlessly obtain trial *de novo* before a lawyer judge by standing mute or pleading guilty, extends as well to state which require the defendant to enter a plea of not guilty in order to obtain the right to trial *de novo* before a lawyer judge?

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments Six and Fourteen. Chapter 50, Article 1, Section 4; Chapter 50, Article 5, Section 13; Chapter 50, Article 4, Section 3, of the West Virginia Code of 1931, as amended.

REASONS WHY THE WRIT SHOULD BE DENIED

1. **There exists a nonfederal question relevant to the constitutional issue raised in the petition which has not been considered or resolved by the Supreme Court of Appeals of West Virginia.**

The petitioner asserts in his petition that a defendant may not plead guilty in a magistrate court and then exercise his right to a trial *de novo* before a circuit court which is presided over by a lawyer judge. The petitioner cites the cases of *State* v. *Stone*, 101 W.Va. 53, 131 S.E. 872 (1926); *Nicely* v. *Butcher*, 81 W.Va. 247, 94 S.E. 147

(1917) and *State ex rel. Wright* v. *Boles*, 149 W.Va. 371, 141 S.E. 2d 76 (1965), in support of this position. All of the above-mentioned cases relied on the general rule that an appeal will not lie from a judgment of conviction in a criminal case rendered upon a guilty plea. None of the above-mentioned cases purported to engage in the art of statutory construction.

However, in 1976, the West Virginia Legislature enacted the following statute concerning appeals from criminal cases in magistrate courts:

> "Any person convicted of an offense in a magistrate court may appeal such conviction to circuit court by requesting such appeal within twenty days of the sentencing for such conviction. The magistrate may require the posting of bond with good security conditioned upon the appearance of the defendant as required in circuit court, but such bond may not exceed the maximum amount of any fine which could be imposed for the offense. Such bond may be upon the defendant's own recognizance. An appeal may be granted by a judge of the circuit court of the county within ninety days from the date of sentencing. The filing or granting of an appeal shall automatically stay the sentence of the magistrate. Trial in circuit court shall be de novo." Chapter 50, Article 5, Section 13, of the West Virginia Code of 1931, as amended.

The West Virginia Legislature made no distinction between a conviction which rests upon a verdict and a conviction which results from a guilty plea. It is conceivable, if not probable, that West Virginia's highest court, if called upon to interpret the above-quoted statute, would construe the term "conviction" to include both guilty verdicts and guilty pleas. The word "conviction" is of equivocal meaning, and its use in a statute presents a

question of legislative intent. *O'Neill* v. *Department of State*, 261 N.Y.S. 2d 937 (1965).

If the term "conviction" were construed to include a plea of guilty, West Virginia's two-tier court system would clearly fall within the realm of constitutionality under the cases of *Ludwig* v. *Massachusetts*, 427 U.S. 618, 49 L. Ed. 2d 732, 96 S. Ct. 2781 (1976), and *Colten* v. *Kentucky*, 407 U.S. 104, 32 L. Ed. 2d 584, 92 S. Ct. 1953 (1972). It would, therefore, be premature for this Court to reach the questions set forth in the petitioner's petition for certiorari.

2. **The record before this Court is not adequate to present the facts necessary for a determination of the issues presented.**

The record before this Court consists of a warrant (Petitioner's Appendix C), a petition for a writ of prohibition (Petitioner's Appendix D), an order from the Supreme Court of Appeals of West Virginia denying the petition (Petitioner's Appendix A), and an order of the Supreme Court of Appeals granting a motion for a stay of execution (Petitioner's Appendix E). None of these aforementioned documents provide this Court with the facts necessary to decide the ultimate issue of whether West Virginia's two-tier trial system is constitutional.

There is an absence of facts concerning three separate crucial elements of the petitioner's claim. First is the lack of supportive facts of the alleged adverse consequences which flow from a trial before a lay magistrate. Petitioner has never been tried nor convicted of the charges pending against her. It is impossible to ascertain whether she received a fair trial before the respondent and whether, as alleged, that trial would be a useless exercise. More importantly, there are no facts to document the alleged financial, emotional and temporal burdens which the petitioner claims are the necessary result of West Virginia's two-tiered system. Any attempt to assess these burdens rest on mere conjecture.

Secondly, the record does not include information concerning the mandatory training programs of the magistrates in West Virginia other than that set forth in West Virginia Code, 50-1-4. More particularly, the educational background and training of this respondent has not been set forth.

Thirdly, there is no discussion concerning the effect at the two-tier system on the overall administration of justice in West Virginia. For example, there is no evidence of whether there is a greater delay in obtaining a hearing before a lawyer judge if West Virginia would abandon its two-tier system.

The respondent contends that these and other salient facts are essential for this Court to properly determine the issue presented. Taking into consideration the inadequate record, certiorari would be improvident and should not be granted.

3. **The issues presented have been decided by this Court.**

The petitioner asserts that the constitutionality of the two-tier trial system of West Virginia has not been addressed by prior decisions of this Court. Respondent contends that the recent decisions of *North* v. *Russell*, 427 U.S. 328 (1976), and *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976), implicitly affirm the constitutionality of West Virginia's system.

Petitioner claims that the West Virginia system is constitutionally suspect because a misdemeanor defendant is tried by a nonlawyer judge in magistrate court before he has the opportunity for a trial *de novo* before a lawyer judge in a circuit court. This was the very issue presented in the case of *North* v. *Russell*, 427 U.S. 328 (1976). In *North*, this Court sustained the Kentucky system, which like West Virginia, had a first tier of lay judges for misdemeanors, from a Sixth and Fourteenth Amendment attack. In *Ludwig* v. *Massachusetts*,

427 U.S. 618 (1976), this Court upheld the Massachusetts sytem in which a defendant was denied a jury trial in the first level. As petitioner admits in her petition, the *North* and *Ludwig* decisions, when read together, stand for the proposition that all constitutional rights need not be observed in the lower-level courts as long as these rights are accorded defendants in the upper-level courts.

However, the petitioner interprets these cases as holding that the defendant has a right to painless access to those constitutional rights at the second tier. Petitioner attempts to distinguish the *North* and *Ludwig* decision by alleging that West Virginia's system does not allow for this painless access. This allegation is based on the premise that West Virginia law does not permit an appeal from a guilty plea. As previously stated in respondent's first argument, it is unclear as a matter of West Virginia law whether an appeal after a guilty plea is permissible. Assuming arguendo that such an appeal is forbidden, the respondent contends that this is not a constitutionally significant distinction.

The respondent maintains that the *North* and *Ludwig* decisions mandate only that no system impose an impermissible infringement on the right to a lawyer judge. Whether the infringement is too great a burden must be viewed in the context of West Virginia's system. According to West Virginia Code, 50-4-3, any defendant in a magistrate court which faces a possible sentence of confinement must be informed of his right to counsel and his right to have counsel appointed if such defendant cannot afford to retain counsel. Therefore, each defendant will be adequately informed of the procedure necessary to obtain a trial *de novo*. Moreover, contrary to petitioner's assertion that the defendant may not stand mute, the defendant is under no obligation to present any defense on his own behalf in order to obtain a trial *de novo*.

The necessity of not pleading guilty in the context of the

other safeguards afforded the defendant is not an impermissible burden on the right to a trial before a lawyer judge. The Supreme Court of Washington, in *Young* v. *Konz*, 558 P. 2d 791 (1977), when faced with this precise issue, ruled that the inability to appeal from a guilty plea is not inconsistent with the holding of *North* v. *Russell*, *supra*. The respondent submits that the prior holdings of this Court have already decided the issue presented and urge that certiorari not be granted for that reason.

CONCLUSION

For the foregoing reasons, respondent submits that the Petition for Writ of Certiorari should be denied and that the order of the Supreme Court of Appeals of the State of West Virginia should thereby be affirmed.

Respectively submitted,

FRANCIS LOUGH, Magistrate for
Wetzel County, West Virginia
Respondent
By Counsel

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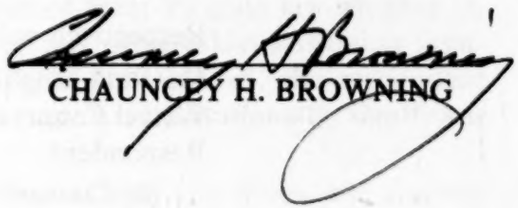
CERTIFICATE OF SERVICE

I, Chauncey H. Browning, one of counsel for the respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8 day of January, 1979, I served three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari on the petitioner by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the petitioner Michael E. Geltner and Larry J. Ritchie, Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001. I further certify that all parties required to be served have been served.



CHAUNCEY H. BROWNING

APPENDIX A

§ 50-1-4. Qualifications of magistrates; training; oath; continuing education; time devoted to public duties.

Each magistrate shall be at least twenty-one years of age, shall have a high school education or its equivalent, shall not have been convicted of any felony or any misdemeanor involving moral turpitude and shall reside in the county of his election. No magistrate shall be a member of the immediate family of any other magistrate in the county. In the event more than one member of an immediate family shall be elected in a county, only the member receiving the highest number of votes shall be eligible to serve. For purposes of this section, immediate family means the relationship of mother, father, sister, brother, child or spouse. Notwithstanding the foregoing provisions of this section, each person who held the office of justice of the peace on the fifth day of November, one thousand nine hundred seventy-four, and who served in or performed the functions of such office for at least one year immediately prior thereto shall be deemed qualified to run for the office of magistrate in the county of his residence.

No person shall assume the duties of magistrate unless he shall have first attended and completed a course of instruction in rudimentary principles of law and procedure which shall be given between the date of election and the beginning of the magistrate's term in accordance with the supervisory rules of the supreme court of appeals.

All magistrates shall be required to attend such other courses of continuing educational instruction as may be required by supervisory rule of the supreme court of appeals. Failure to attend such courses of continuing educational instruction without good cause shall constitute neglect of duty. Such courses shall be provided at least once every other year. Persons attending such courses

outside of the county of their residence shall be reimbursed by the State for expenses actually incurred not to exceed thirty-five dollars per day and for travel expenses at the rate of fifteen cents per mile for one round trip.

Each magistrate shall, before assuming the duties of office, take an oath of office to be administered by the circuit judge of the county, or the chief judge thereof if there is more than one judge of the circuit court. Each magistrate shall maintain the qualifications for office at all times.

Each magistrate who serves five thousand or less in population shall devote such time to his public duties as shall be required by rule or regulation of the judge of the circuit court, or the chief judge thereof if there is more than one judge of the circuit court. Each magistrate who serves more than five thousand in population shall devote full time to his public duties. As nearly as practicable the work load and the total number of hours required shall be divided evenly among the magistrates in a county by such judge. (1976, c. 33.)

§ 50-2-3. Criminal jurisdiction.

In addition to jurisdiction granted elsewhere to magistrate courts or a justice of the peace, magistrate courts shall have jurisdiction of all misdemeanor offenses committed in the county and to conduct preliminary examinations on warrants charging felonies committed within the county. A magistrate shall have the authority to issue arrest warrants in all criminal matters, to issue warrants for search and seizure and, except in cases involving capital offenses, to set and admit to bail.

Magistrate courts shall have the jurisdiction of violations of subsection (c), section four hundred one [§ 60A-4-401], article four, chapter sixty-A of this Code under the provisions of section four hundred seven [§ 60A-4-407] of such article, and may discharge the defendant under the provisions of section four hundred seven of said article

four. The exercise of such jurisdiction shall not preclude the right of the accused to petition the circuit court of the county for probation under the provisions of section four [§ 62-12-4], article twelve, chapter sixty-two of this Code. (1976, c. 33.)

§ 50-4-3. Appointment of counsel in criminal proceeding.

In any criminal proceeding in a magistrate court in which the applicable statutes authorize a sentence of confinement the magistrate shall forthwith advise a defendant of his right to counsel and his right to have counsel appointed if such defendant cannot afford to retain counsel. In the event a defendant requests that counsel be appointed and executes an affidavit that he is unable to afford counsel, the magistrate shall stay further proceedings and shall request the judge of the circuit court, or the chief judge thereof if there is more than one judge of the circuit court, to appoint counsel. Such judge shall thereupon appoint counsel. If there is no judge sitting in the county at the time of the request then the clerk of the circuit court shall appoint counsel from a list of attorneys in accordance with the rules established by such judge of the circuit court. Counsel shall be paid for his services and expenses in accordance with the provisions of article eleven [§ 51-11-1 et seq.], chapter fifty-one of this Code. (1976, c. 33; 1977, c. 82.)

§ 50-5-13. Appeals in criminal cases.

Any person convicted of an offense in a magistrate court may appeal such conviction to circuit court by requesting such appeal within twenty days of the sentencing for such conviction. The magistrate may require the posting of bond with good security conditioned upon the appearance of the defendant as required in circuit court, but such bond may not exceed the maximum amount of any fine

which could be imposed for the offense. Such bond may be upon the defendant's own recognizance. An appeal may be granted by a judge of the circuit court of the county within ninety days from the date of sentencing. The filing or granting of an appeal shall automatically stay the sentence of the magistrate. Trial in circuit court shall be de novo. (1976, c. 33.)